restored the decision of the trial Judge. The Board said:

"It is of course true to say that an appeal to a Court of appeal is a rehearing of the case. But much authority goes to show that such a court is, and indeed should be, much fettered in practice in its ability to disagree with findings of a trial judge in matters of this kind, particularly when they are restricted to the judge's notes of the evidence given, and given through an interpreter, and particularly when the judge has formed the opinion from the manner in which one of the parties has given his evidence that he was lying."

Another approach to this appeal would be to consider whether the appellants have proved the case on a balance of probabilities. Here, I am reminded of the words of Lord Diplock in *Peter Thomas Mahon* v. *Air New Zealand & Ors.*[3]:

"Where facts are in dispute in civil litigation conducted under the common law system of procedure, the judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth; and if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation."

In the present case, at the close of the appellants' case, on the evidence of the first appellant that he was standing on the grass verge when he was collided into by the lorry, the learned District Judge found that a *prima facie* case had been made that he heard the defence. On the respondent's version of the accident that the first appellant suddenly dashed across the road that he had to jam his brakes and swerve to the left, at the close of the whole case, the learned District Judge was bound to consider on a balance of probabilities the evidence of the two versions before him. He rejected the case for the appellants. I am of the opinion that the learned District Judge had correctly applied the "rules as to onus of proof" when he dismissed the appellants' claim. For the reasons I have given, I would dismiss this appeal.

Appeal allowed.

Solicitors: *Wee Ramayah & Partners ; Goh Poh & Partners.*

HIAP HONG & CO. PTE. LTD. v. HONG HUAT CO. (PTE.) LTD.

[O.C.J. (Wee Chong Jin C.J.) May 24, 1985]
[Singapore – Suit No. 95 of 1984]

Contract – Building contract – Money due on "Penultimate Certificate of Payment" issued by architects – Meaning of "Penultimate" – Whether Interim Certificate or Final Certificate.

Architects – Building contract – Money due on "Penultimate Certificate of Payment" issued by architects – Meaning of "Penultimate" – Whether Interim Certificate or Final Certificate.

The plaintiffs/contractor claimed against the defendants/employer the sum of $572,729.91 being money due on a payment certificate stated to be a "PENULTIMATE Certificate of Payment" dated December 6, 1983 issued by the Employer's Architects pursuant to a building contract dated January 27, 1979, made between the Contractor and the Employer. Under the said building contract, the Employer agreed in consideration of the Contractor erecting and completing a shopping centre, *inter alia*, to pay to the Contractor within 30 days from the date of the Certificates issued by the Employer's Architects thereunder such sums as should be certified as being due to the Contractor thereon.

Under Clause 30 of the contract the architects had to issue monthly an Interim Certificate of Payment and the Employer must pay the amount certified within 30 days and when the requirements of Clause 30(6) had been complied with the architects had to issue the Final Certificate. There was no express provision for the issue of a "penultimate" Certificate of Payment.

The crucial question in this appeal was whether or not the certificate issue by the Architects dated 1983 was an Interim Certificate within the meaning of Clause 30 of the contract.

Held, allowing the appeal: (1) a payment certificate cannot be a Final Certificate unless the architect intends it to be a Final Certificate;

(2) the term "penultimate" used by the architects in the Certificate of Payment means the last but one certificate under the contract;

(3) in the present case the certificate was an interim payment certificate governed by Clause 30(1) of the building contract.

CIVIL SUIT.

W.E. Jansen for the plaintiffs.

M. Karthigesu (*Richard Sam* with him) for the defendants.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal against the decision of the Assistant Registrar granting the defendants' application to stay further

proceedings in the action pursuant to section 7 of the Arbitration Act (Cap. 16). The plaintiffs (hereinafter referred to as "the contractor") claimed against the defendants (hereinafter referred to as "the Employer") the sum of $572,729.91 being money due on a payment certificate stated to be a "PENULTIMATE Certificate of Payment" dated December 6, 1983 issued by the employer's architects pursuant to a building contract dated January 27, 1979, ("the contract") made between the contractor and the employer whereby the employer agreed in consideration of the contractor erecting and completing a proposed 6/5 storey shopping centre, *inter alia*, to pay to the contractor within 30 days from the date of the Certificates issued by the employer's architects thereunder such sums as should be certified as being due to the contractor thereon.

Under Clause 30 of the contract the architects have to issue monthly an Interim Certificate of Payment and the employer must pay the amount certified within 30 days and when the requirements of Clause 30(6) have been complied with the architects have to issue the Final Certificate. There is no express provision for the issue of a "penultimate" Certificate of Payment. The crucial question in this appeal is whether or not the certificate issued by the Architects dated December 6, 1983 is an Interim Certificate within the meaning of Clause 30 of the contract. It is contended on behalf of the contractor that it is in fact an Interim Certificate and the amount certified therein fell due and payable by the employer under Clause 30(1) which reads:–

"30(1) At the period of Interim Certificates named in the appendix to these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the Employer and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment therefore within the Period for Honouring Certificates named in the appendix to these Conditions.

Interim valuations shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate."

The employer contends that the penultimate certificate is in fact a Final Certificate though in the form of an Interim Certificate.

Mr. Wu on behalf of the contractor submits that the term "penultimate" should be given its ordinary grammatical meaning of "last but one" and since the last payment certificate is the Final Certificate referred to in Clause 30(6) and (7), the "penultimate" payment certificate is necessarily an interim payment certificate governed by Clause 30(1). He says that the term "penultimate payment certificate" is commonly used by architects and engineers to mean the interim payment certificate next preceding the Final Certificate to be issued in order to place the employer and contractor on notice that his next certificate will be the Final Certificate. In this way, the employer will have the opportunity to serve his notice of reference prior to the issuance of the Final Certificate if he has outstanding claims against the Contractor as Clause 30(7) precludes him from issuing a notice of reference after the Final Certificate is issued. On the contractor's part, he will know that the next certificate to be issued will be the Final Certificate.

Mr. Karthigesu on behalf of the employer submits that the penultimate payment certificate dated December 6, 1983, whatever else it might be, is clearly not an interim payment certificate governed by Clause 30(1). The penultimate payment certificate of the architects states, so far as material, as follows:–

"PENULTIMATE
Certificate of Payment
Date of Contract: 27/1/79
Original Value of Contract:
$10,243,091.26

We hereby certify that under the Terms of the Building Contract the sum of Dollars Five Hundred and Seventy Two Thousand Seven Hundred and Twenty Nine and cents Ninety One $572,729.91

is now due to Hiap Hong Co. Pte Ltd. for work done and materials supplied up to

Value of work and materials on site by this Contractor	$11,288,727.77
Retention money withheld	–
Net value of works and materials to date	$11,288,727.77
Less Payments previously certified	$10,715,997.86
Amount payable by this Certificate	572,729.91

Please make payment direct to Contractor."

Mr. Karthigesu submits that the certification of "the value of work and materials of site" at $11,288,727.77 and of "Net value of works and materials to date" at the same amount *i.e.* $11,288,727.77 is a clear indication and therefore a certification that the works undertaken by this

building contract have been completed and is valued at $11,288,727.77. He further submits that the sum of $572,729.91 certified as payable by the penultimate payment certificate is the difference between "net value of works and materials to date" and the total amount paid to the contractor under previous interim payment certificates and that the penultimate payment certificate can be nothing less than and is in fact a Final Certificate, though in the form of an interim certificate of payment and that it is called a Penultimate Certificate patently to avoid the implications of Clause 30(7) and the arbitration clause, Clause 34.

I cannot accept Mr. Karthigesu's submissions. It is plain that a payment certificate cannot be a Final Certificate unless the architect intends it to be the Final Certificate and the architects' letter of December 1, 1983 stating, *inter alia*, that "We have decided that a penultimate certificate be issued" clearly shows that the architects did not intend the penultimate certificate of December 6, 1983 to be the Final Certificate under the contract.

Another submission advanced by Mr. Karthigesu is that the employer challenges that "even the $572,929.91 is due" and asserts that the whole of the final measurement and valuation is in dispute. The only basis to support the assertion that there is a dispute is the employer's contention that the project quantity surveyor, who is the employer's own quantity surveyor, had over measured or that the employer's own architects had over certified. No evidence has been produced, nor any explanation offered, to substantiate that contention and I am of the opinion that there is no real basis for that contention to warrant a stay of proceedings.

I accept Mr. Wu's submission that the term "penultimate" used by the architects in the Certificate of Payment dated December 6, 1983 means the last but one certificate under the contract and that the certificate dated December 6, 1983 is an interim payment certificate governed by Clause 30(1) of the building contract. Accordingly, I allow the appeal and dismiss the employer's application for stay of these proceedings with costs in any event.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Cooma Lau, Loh & Karthigesu, Gupta & Sam.*

HEISAN B.V. v. GIH INVESTMENT PTE. LTD.

[O.C.J. (Chua J.) November 4, 1986]

[Singapore – Originating Summons No. 811 of 1986]

Land Law – Strata Title – Sale and purchase agreement – Outgoings to be discharged by vendor before completion – Renovations and repairs to building – Whether "outgoing" prior to completion – Whether purchasers liable to pay.

Management Corporation – Renovations and repairs to building done by management corporation before completion of sale and purchase agreement – Whether "outgoing" payable by purchasers – Land Titles (Strata) Act (Cap. 277, 1970 Ed.), s. 34.

Strata Title – Management corporation – Renovations and repairs to buildings done by management corporation before completion of sale and purchase agreement – Whether "outgoing" payable by purchasers – Land Titles (Strata) Act (Cap. 277, 1970 Ed.), s.34.

In this case, by a sale and purchase agreement dated March 3, 1986, the defendants sold to the plaintiffs the property known as #15-01 to #15-12 UIC Building. By clause 9 of the said agreement, it was provided that the sale and purchase was to be subject to the Singapore Law Society's Conditions of Sale 1981, clause 6 of which provides that the outgoings will be discharged by vendor down to but excluding the date fixed for completion.

The plaintiffs' solicitors, in the course of their requisitions, received a reply dated May 3, 1986, from the Management Corporation Strata Title No. 360 responsible for the UIC Building ("the Building"). The reply stated, *inter alia*, that the Management Corporation was currently performing renovations and repairs to the Building, the costs of which were estimated at $9 million.

The parties have worked out the contribution of the said property for the renovations and repairs for the Building and have set aside a sum of approximately $220,000 and completed the sale and purchase on May 30, 1986, without prejudice to the rights of the parties to seek the declaration of the court as to who was liable to pay the $220,000.

The question which arose for determination in this case was whether the defendants were under any liability, prior to the completion of the said agreement, to contribute towards the renovations and repairs to the Building which were being carried out by the Management Corporation.

Held: (1) the renovations and repairs to the Building were commenced before May 3, 1986, even before the plaintiffs wrote to the Management Corporation and well before the date of completion of the said agreement. It is clear that by section 34(3)(b) read with section 34(5), the defendants had already incurred liability before the completion of the said agreement notwithstanding that no contribution had been levied under section 34(5) as the Management Corporation's expenditure would ultimately be borne by the subsidiary proprietors;